

# EXHIBIT 1b

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

DONALD MORISKY

Plaintiff,

vs.

MMAS RESEARCH, STEVEN TRUBOW,  
DUSTIN MACHI RODNEY WATKINS

Defendants.

Case No.: 2:21-CV-01301-DWC

DECLARATION OF RODNEY  
WATKINS IN SUPPORT OF  
DEFENDANTS

I, RODNEY WATKINS, make the following declaration.

1. I am over 18 years of age, of sound mind, and otherwise competent to make this Declaration of my own personal knowledge.
2. I am a Certified Public Accountant (CPA). I live and work in Coronado, California.
3. I have served in the position of CPA for MMAS Research LLC and Steven Trubow since June 2018 to the present.
4. I hereby declare the truth for the following facts concerning my accounting services for MMAS Research LLC and Steven Trubow for the period following the execution of their CR2A settlement agreement with Donald Morisky.
5. To prepare this Declaration, I have reviewed all the financial records in my

DECLARATION OF RODNEY WATKINS - 1

**Virgo Law LLC**  
119 1<sup>st</sup> Ave. S., Ste. 310  
Seattle, Washington 98104  
(206) 569-8418

possession.

6. To the best of my knowledge, As of May 22, 2024, the total assets of MMAS Research LLC were \$2510.00 (See Umpqua Bank Letter)
7. To the best of my knowledge, As of May 22, 2024, the total assets of Steven Trubow were \$5414.44 (See Umpqua Bank Letter)
8. To the best of my knowledge as of May 22, 2024, Neither Steven Trubow or MMAS Research LLC had any credit card accounts or secured revolving credit loans.
9. To the best of my knowledge as of May 22, 2024, Neither Steven Trubow or MMAS Research LLC had any securable assets; property, stocks, bonds, life insurance, or retirement accounts to borrow against other than one seven-year-old automobile with a Blue Book Value of \$20,000.

*(Signatures on next page)*

DECLARATION OF RODNEY WATKINS - 2

**Virgo Law LLC**  
119 1<sup>st</sup> Ave. S., Ste. 310  
Seattle, Washington 98104  
(206) 569-8418

1 I declare under penalty of perjury under the laws of the  
2 United States of America that the foregoing is true and correct.  
3

4 Executed on May 22, 2024.

5   
6 \_\_\_\_\_  
7 RODNEY WATKINS, Affiant

8  
9  
10 /s/ Patricia Ray Pennsylvania Bar#  
11 31989  
12 The Law Office of Patricia Ray  
13 5 Old Mill Road, Freeport PA  
14 16229 Telephone: 215-908-  
15 6810 raypatricia@yahoo.com

16 /s/ Brett Harris Brett Harris, WSBA  
17 #55680 VIRGO  
18 LAW LLC  
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21 Telephone: (206) 569-8418 Brett@virgolawseattle.com  
22  
23  
24  
25  
26  
27

28 DECLARATION OF RODNEY WATKINS - 3

Virgo Law LLC  
119 1<sup>st</sup> Ave. S., Ste. 310  
Seattle, Washington 98104  
(206) 569-8418



**UMPQUA BANK**

Umpqua Bank  
201 Western Ave  
Petaluma, CA 94952  
05/22/2024

To Whom it may concern,

This letter verifies that, as of May 22, 2024, Steven Trubow has an account with Umpqua Bank. Below are the records related to the account:

Type of Account: Personal Checking

Account Number: 3968073514

Current Balance: \$5,414.44

Date Opened: 08/18/2022

Thank you,

A handwritten signature in black ink, appearing to read "Jesse Fuentes".

Jesse Fuentes

Personal Banker



**UMPQUA BANK**

Umpqua Bank

201 Western Ave

Petaluma, CA 94952

05/22/2024

To Whom it may concern,

This letter verifies that, as of May 22, 2024, MMAS Research LLC has an account with Umpqua Bank.  
Below are the records related to the account:

Type of Account: Business Checking

Account Number: 4862260215

Current Balance: \$2,510.15

Date Opened: 08/19/2022

Thank you,

A handwritten signature in black ink, appearing to read "Jesse Fuentes".

Jesse Fuentes

Personal Banker

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

MORISKY, )  
 ) No. 2:21-cv-01301  
Plaintiff, ) RSM-DWC  
 )  
v. )  
 )  
MMAS RESEARCH LLC, et al., )  
 )  
Defendant. )

**VERBATIM TRANSCRIPT OF PROCEEDINGS**

**OCTOBER 19, 2023**

Before the  
Hon. David W. Christel

Appearing via videoconference from

United States Courthouse  
1717 Pacific Avenue  
Tacoma, WA 98402-3200

Jessica L. Turner, CCR No. 3187  
Court Reporter  
Chehalis, Washington 98532

**APPEARANCES**

For the plaintiff:

F. CHRIS AUSTIN  
Wiede & Miller, Ltd.  
10655 Park Run Drive, Suite 100  
Las Vegas, Nevada 89144

AMANDA BRUSS  
Bruss Legal PLLC  
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Denver, Colorado 80238

For the defendant:

PATRICIA L. RAY  
David & Raymond International  
Patent Group  
108 North Ynez Avenue, Suite 128  
Monterey Park, California 91754

BRETT CARLTON HARRIS  
Virgo Law Firm  
119 1st Avenue South, Suite 310  
Seattle, Washington 98104



1 (The following took place on October 19, 2023:)

2 THE CLERK: Good morning. The U.S. District  
3 Court for the Western District of Washington is now  
4 in session. The Honorable David W. Christel  
5 presiding.

6 THE COURT: Good morning, everyone. The Court  
7 is hearing the case of Morisky v. MMAS Research LLC  
8 and other defendants. Case number is 21-1301.

9 Counsel, please make your appearances, first  
10 for the plaintiff.

11 MR. AUSTIN: Yes. Good morning, your Honor.  
12 Chris Austin and Amanda Bruss for the plaintiff,  
13 Dr. Donald Morisky.

14 THE COURT: All right. Good morning to both of  
15 you. Mr. Austin, are you going to take the lead  
16 today on oral argument?

17 MR. AUSTIN: We have divided these up since we  
18 divided them up in the briefing, so to some degree,  
19 there will be a little bit of back and forth. But  
20 based on what Your Honor was looking for, I think I  
21 probably have a little more than Ms. Bruss does in  
22 our response today. But they will be topic by topic.

23 THE COURT: Okay. Very well. Thank you.  
24 And for the defendants.

25 MS. RAY: Hello, Your Honor. This is Patricia

1 Ray. I'm representing the defendants. And also,  
2 Brett Harris is here I believe. I will be doing most  
3 of the speaking, but Mr. Harris may have some  
4 information to add.

5 THE COURT: All right. Good morning, Ms. Ray.  
6 And good morning, Mr. Harris.

7 This case, so also, we're obviously proceeding  
8 by Zoom. No portion of this hearing can be recorded  
9 in any way. We do have a court reporter who is  
10 reporting the proceedings this morning. We've also  
11 got some personnel from the court who are not  
12 participating but are listening in to today's  
13 proceeding.

14 Several motions are pending in this matter.  
15 I'll list them for the record. We've got plaintiff's  
16 motion for further sanctions; that's at Docket 154.  
17 Plaintiff's got another motion for sanctions at  
18 Docket 156. Plaintiff has a third motion for  
19 sanctions and contempt at Docket 158. There is a  
20 motion to stay, or in the alternative, to amend the  
21 scheduling order; That's docket 164. And then we've  
22 got defendant's motion under Federal Rule 54(b),  
23 Docket 162.

24 And it sounds like, Mr. Austin, you and  
25 Ms. Bruss received the email where I tried to

1 structure today's argument, so you've received that.

2 Ms. Ray, did you and Mr. Harris receive that  
3 email?

4 You are on mute, Ms. Ray.

5 MS. RAY: Yes, we did. Yes, we did, Your  
6 Honor.

7 THE COURT: Okay. Good. Very well. I've  
8 looked at the motions, and I tried to structure it in  
9 a way that helped get to the argument in an efficient  
10 way. So I appreciate the fact that counsel have  
11 reviewed that and are ready to proceed in that way.

12 I'll just indicate we're going to have to take  
13 a break at 10:15 to 10:30. The Court has an  
14 earthquake drill that is happening today, and it just  
15 happened to occur right in that time frame. So when  
16 we do that, Counsel, you don't need to drop off the  
17 Zoom. You can just remain. But I will drop off and  
18 will go out of the session. I'm planning to return  
19 at about 10:30. So we will keep that in mind. We  
20 will just adjust as needed, so.

21 Well, with that, let's start with that first  
22 argument, which is the request for sanctions  
23 regarding the destruction of the laptop. I'll first  
24 hear from plaintiff on that. And I'll -- is that  
25 you, Ms. Bruss, or --

1 MS. BRUSS: Yes, Your Honor. That would be me.

2 THE COURT: Okay. So please proceed.

3 MS. BRUSS: Thank you, your Honor. And I will  
4 say, the motion is -- our first motion at 154 was not  
5 limited to the laptop, although that was the primary  
6 issue in that motion. That motion was also based on  
7 a lack of production of documents, privilege log,  
8 interrogatories, and failure to appear at a  
9 deposition.

10 But as for the laptop issue, our argument, as  
11 we put forth in our brief, is primarily that the  
12 laptop contained information. We don't know the  
13 scope of that information. What we do know is that  
14 the defendant testified that all of the licensing  
15 documents, negotiation documents, settlement  
16 agreements, and things of that nature were on that  
17 laptop, were not produced, and were destroyed and  
18 then thrown away before we had an opportunity to  
19 review it but after we asked for the documents.

20 So from the timeline that we've been able to  
21 piece together way after the fact -- again, we  
22 weren't told any of this during the course while it  
23 was happening. We didn't know the laptop had the  
24 documents. We didn't know the laptop had been broken  
25 and was being held. We didn't find out it was thrown

1 away until after it happened. But all of that had  
2 happened while we were filing motions to compel,  
3 while we're trying to meet and confer, while we were  
4 asking for documents.

5 So we believe that the fact that the hard drive  
6 was thrown away in the middle of motion practice  
7 tends to indicate that there was probably information  
8 on there that was useful to us. And at the end of  
9 the day, we don't know what was there, but we know we  
10 can't have that information anymore.

11 And so at this point, we are left without a  
12 large chunk of the evidence that we need to make our  
13 case through no fault of plaintiffs. We have been  
14 trying desperately to get this information since last  
15 fall, for over a year. And it wasn't until I think  
16 March, this last March that the hard drive is thrown  
17 away.

18 So from our perspective, you know, there's --  
19 while we understand technological problems happen,  
20 laptops break, there is no way to know whether we  
21 could have recovered the hard drive.

22 From the testimony that we had, it was the  
23 laptop broke because it was in a soft case instead of  
24 a hard case. Well, that would lead me to believe  
25 that a screen might be broken or a keyboard, but the

1 hard drive itself should have been able to be  
2 recovered, but we don't know because we never got the  
3 opportunity to look at that. So that, coupled with  
4 the fact that, honestly, we are two years into this  
5 case and we still don't have financial documents,  
6 records of licensing, the bulk of what was asked for  
7 in this case. We still don't have it.

8 And at this point, we understand that there is  
9 a public policy, a desire to resolve cases on their  
10 merits. The problem is this case can't be resolved  
11 on its merits without the information that only  
12 defendants had. And they won't turn it over. They  
13 won't respond to document requests, interrogatories,  
14 depositions. They won't produce documents when  
15 ordered by to this Court. We still don't have a  
16 privilege log. So without compliance with  
17 discovery -- and then when this Court issued  
18 sanctions, they weren't paid. So we don't know what  
19 other recourse there is at this point.

20 So we understand that the ask that we're coming  
21 to you with is a big one. We do know that. But at  
22 this point, we don't know that it's appropriate for  
23 plaintiff to continue to spend money, time, and  
24 energy to get resolution on this claim when we are  
25 the only ones showing up.

1 THE COURT: So, Ms. Bruss, on that laptop, it  
2 sounds like you've identified some of the topics or  
3 categories of documents that were on there.

4 MS. BRUSS: Yes, sir.

5 THE COURT: And are you stating to the Court  
6 that there is no other way to obtain those documents?

7 MS. BRUSS: We don't know -- I mean, from the  
8 defendant, presumably email correspondence,  
9 correspondence regarding the negotiation of  
10 settlements, negotiations about licenses, in theory,  
11 I suppose we could get them. I don't know who we  
12 would get them from; I guess defendant's attorneys,  
13 although those are defendant's agents and they should  
14 have produced them in response to discovery a year  
15 ago. But also, who are the licenses issued to? We  
16 don't know because we don't have that information.  
17 It wasn't produced in response to interrogatories.

18 So in theory, yeah, we could serve  
19 interrogatory. We could serve subpoenas on all the  
20 parties on the other side of those transactions, but  
21 we don't know who they are. And defendants won't  
22 tell us.

23 THE COURT: So it sounds like plaintiff is  
24 saying that you do know some of the categories of  
25 information that was on that laptop and that you

1 don't have any way to try to obtain them from a  
2 third-party source; is that correct?

3 MS. BRUSS: That's correct, Your Honor.

4 THE COURT: Okay. And in your motion, you're  
5 moving, I think, under the Court's inherent authority  
6 to impose sanctions. Are you also moving under  
7 Federal Rule 37(e) on spoliation of evidence?

8 MS. BRUSS: Yes, your Honor.

9 THE COURT: What is your argument on Rule  
10 37(e), if you can summarize it for me?

11 MS. BRUSS: Well, our argument is similar.  
12 It's that the defendant knew that this information  
13 was relevant and discoverable, was under a duty to  
14 preserve and disclose it, and didn't do that. And at  
15 this point, you know, we don't have any other  
16 recourse to obtain these documents.

17 THE COURT: Okay. And in terms of sanctions,  
18 you are asking the Court to -- case dispositive  
19 sanctions I think is your primary request. What is  
20 the alternative to that?

21 MS. BRUSS: Your Honor, that's the problem is  
22 that we don't know that there is a viable  
23 alternative. I mean, the other alternative would be  
24 I suppose an order by this Court to produce this  
25 information, but we've already done that. Or the



1 Court could order sanctions to be paid, and we've  
2 already done that.

3 At this point, I don't know how we compel the  
4 other party who has access to these documents or the  
5 ability to recover some of them, we don't know how to  
6 get them to comply because nothing has worked thus  
7 far.

8 So, You know, in theory, also we could ask for  
9 a jury instruction that whatever was on the laptop  
10 would have been unfavorable to the defendants, but  
11 the problem is, we need these documents to show who  
12 the license -- who was issued licenses, what those  
13 licenses were for, the fees that were paid. We have  
14 no way of proving damages without any of these  
15 financial documents.

16 And while the defendants are saying now that  
17 there were not financial documents on the laptop,  
18 they still haven't produced financial documents, for  
19 the most part. But also the licenses would tell us  
20 how much was paid. We don't have that information.  
21 So that's -- that's crucial for us to either to  
22 also -- to make our case and also to prove damages.

23 So I don't know how an adverse inference would  
24 help. We don't have numbers. We don't have the  
25 facts that we need. We know that some licenses were

1       issued, but we don't know to who.

2               THE COURT: And it sounds like you are saying  
3       you don't know to whom those licenses were issued and  
4       you don't know what revenues were produced, if any,  
5       as a result of those licenses and that plaintiffs  
6       have no other way to determine that information; is  
7       that plaintiff's position?

8               MS. BRUSS: Yes, Your Honor. We acknowledge  
9       that we could probably get some pieces of information  
10      if we subpoenaed defendant's agents, although we  
11      believe at this point that's not appropriate for us  
12      to have to spend more money trying to get documents  
13      that frankly are within the possession, custody, and  
14      control of the defendants and should have been  
15      produced a year ago. But even assuming that we are  
16      going to go down the road, reopen discovery, spend  
17      another year on the case and send out a bunch of  
18      subpoenas, I don't know that we would get a complete  
19      picture even through that process at this point.

20              THE COURT: So you wouldn't get a complete  
21      picture. How is it going to be shored? I mean,  
22      what -- because if you did some third-party  
23      subpoenas, you would get some information presumably;  
24      right?

25              MS. BRUSS: In theory, yes. We don't know

1 because we didn't know we would even need to be  
2 sending out subpoenas during the discovery period  
3 here. So we need to start with figuring out who to  
4 send subpoenas to. I suppose defendant's attorneys,  
5 agents, their financial -- their bookkeeper, which we  
6 didn't know. Apparently he has documents, so we  
7 could subpoena him. And then once we got those  
8 documents, we could go through them, send out new  
9 subpoenas to find information from the licensing  
10 partners, but again, we don't know if that's even  
11 going to get us anywhere, because we don't know if  
12 there were licensed issued to third parties where the  
13 attorneys weren't involved, for example.

14 THE COURT: Yeah. I understand that.

15 So at some point, plaintiffs learned about this  
16 broken computer, this lost laptop, and at that point  
17 you -- the plaintiff has not yet submitted any  
18 third-party subpoenas or made any other efforts to  
19 obtain the information that might have been on that  
20 laptop from any third-party sources; correct?

21 MS. BRUSS: That's correct. Discovery had  
22 already closed, and we had extended the discovery to  
23 be able to take defendant's deposition. And this  
24 Court had ordered production of a bunch of documents.  
25 So at the time, we had assumed or believed that

1 defendants would comply with the Court's order and  
2 produce documents. And so I guess in theory, we  
3 could have served subpoenas, but I'm not entirely  
4 sure who we would have served them on prior to the  
5 depositions, because that was all happening when the  
6 Court had already compelled defendants to produce  
7 things.

8 THE COURT: Okay. So just to confirm, you  
9 learned about the lost laptop after the close of  
10 discovery; is that correct?

11 MS. BRUSS: Yes, sir. Yes, your Honor.

12 THE COURT: All right. Anything else,  
13 Ms. Bruss, on the laptop?

14 MS. BRUSS: That's all I have, your Honor.

15 THE COURT: Okay. Ms. Ray or -- Ms. Ray, are  
16 you presenting on this one?

17 MS. RAY: Yes. Yes, Your Honor --

18 THE COURT: Just a second, Ms. Ray.

19 MS. RAY: (Audio disturbance.)

20 THE COURT: Ms. Ray -- Ms. Ray. Ms. Ray, we  
21 can't -- your -- your connection is breaking in and  
22 out. I can't -- I haven't heard anything you've  
23 said.

24 MS. RAY: Yes. Can you hear me?

25 THE COURT: I can hear you now, but I can't see

1       you.

2               MS. RAY: All right. How about now?

3               THE COURT: Well, we can hear you, but I  
4       can't --

5               MS. RAY: All right. Let's see. It says -- it  
6       says I'm on video.

7               THE COURT: Okay. There you go. So now I can  
8       see your video.

9               MS. RAY: Okay. All right. So, Your Honor,  
10       this entire issue is blown up beyond proportion, that  
11       the idea of the laptop was mentioned by Mr. Trubow in  
12       his deposition, but Mr. Austin, who was conducting  
13       the deposition, didn't allow him to explain that the  
14       laptop had broken years before. It was a dead -- a  
15       dead laptop with very little on it except training  
16       materials. When Mr. Trubow tried to explain that it  
17       was used for training, he was cut off and he couldn't  
18       explain. He said specifically there was no financial  
19       documents on that laptop. It was simply a training  
20       laptop.

21               And it broke when it fell out of his backpack,  
22       and then it fell apart. He put it in the garage and  
23       later on threw it away. And it was no, like,  
24       intentional act to hide discovery. There was pretty  
25       much nothing there of interest on there. So the

1 plaintiff's attorneys have used this to blow it up  
2 into a situation where they say they can't get  
3 evidence, so they use it as an excuse.

4 To redouble the situation, plaintiff's  
5 attorneys keep complaining that they can't get  
6 categories of document production. But, Your Honor,  
7 we have produced everything available. There really  
8 is very little in the licensing documents. There is  
9 nothing for a privilege log. There were no financial  
10 documents on that laptop, and Mr. Trubow contacted  
11 his -- during the deposition, contacted his  
12 accountant and had financial reports for the company  
13 produced and everything that we have has been  
14 provided.

15 If plaintiff's attorneys would like to go  
16 forward with other approaches to getting information  
17 they claim that they don't have, which we would  
18 provide if we had it, they should go ahead and do  
19 that. They should go ahead and do subpoenas to the  
20 joint representation attorneys. They should do  
21 subpoenas for the things they need -- they say they  
22 need to get, because starting in May, I've  
23 provided -- I went over the document request  
24 carefully with -- with the client and went through  
25 everything we could possibly get to produce, and we

1 provided that. We sent them in categories, in emails  
2 to Mr. Austin. And then at Mr. Trubow's deposition,  
3 we went over those categories. There was  
4 questioning. We provided everything we could, and  
5 during the deposition as topics came up, we provided  
6 additional documentation. We went through everything  
7 that we could to give documents and answers to  
8 questions.

9 So at this point, the laptop, it had very  
10 little on it. It was inadvertently -- it died, so  
11 now we're -- we don't have anything else to provide  
12 to the Court. I mean not to the Court. Either to  
13 the parties. And the laptop issue is just completely  
14 an overblown excuse for -- it's a mountain out of a  
15 mole hill.

16 THE COURT: So, Ms. Ray --

17 MS. RAY: -- your Honor.

18 THE COURT: A question for you, Ms. Ray.

19 MS. RAY: Yeah. Sure.

20 THE COURT: I'm taking your client's testimony  
21 as being or as -- you're stating that your client  
22 would say that he did not know about this laptop  
23 prior to the deposition; is that correct?

24 MS. RAY: Not exactly. He knew that it was a  
25 broken laptop that he hadn't used for a long time and

1 had thrown it away.

2 THE COURT: And do we -- I'm not clear on the  
3 record on this. Do we know at what point he threw  
4 away the laptop? I mean, for instance, was it before  
5 this case commenced? Was it before the closing of  
6 the discovery period? At what point did he throw it  
7 away?

8 MS. RAY: It was some point in his move, in his  
9 move in early 2023. It was during -- after the case  
10 had been filed, yes.

11 THE COURT: The case had been filed, and was  
12 discovery open at the time?

13 MS. RAY: I think discovery may have started.  
14 There was no discovery request made at that point,  
15 but discovery was -- I think it had been initiated.

16 THE COURT: And I think you said that he -- he  
17 knew there was information on that laptop which  
18 related to issues in this case; is that correct? Did  
19 he know that?

20 MS. RAY: He -- he said it had training  
21 materials on that, which I don't think he thought  
22 that they were relevant to the case, and the laptop  
23 was dead anyway. In his mind, it wasn't relevant.

24 THE COURT: Anything else, Ms. Ray, on the  
25 issue of the laptop?



1 MS. RAY: Not for now.

2 THE COURT: What about sanctions, Ms. Ray? I  
3 mean, the plaintiff is asking for case dispositive  
4 sanctions. Let's assume the Court decides that there  
5 should be some sanctions but not at that severity.  
6 What would you recommend as an alternative sanction  
7 if the Court heads in that direction?

8 MS. RAY: I would say that it would be  
9 appropriate to allow plaintiff to subpoena, so issue  
10 subpoenas to get information from other sources. I  
11 don't know what information they want. We produced  
12 everything we have. So they might -- they might go  
13 forward with subpoenas to third parties, prior  
14 attorneys of the organization who might have some  
15 document -- who would have documents about the  
16 licensing of the Morisky widget or something like  
17 that. So I don't know what they are trying to get,  
18 because we provided everything we have. But they  
19 could go forward with third-party subpoenas. And I  
20 think that would be appropriate for them to get what  
21 they wish to find.

22 THE COURT: All right. Thank you, Ms. Ray.  
23 Ms. Bruss, would you like to reply?

24 MS. BRUSS: I would, Your Honor. I won't take  
25 up too much time, but as far as whether the

1 defendants knew the documents on the laptop were  
2 relevant, defendant raised the issue during his  
3 deposition when we asked for documents. So he knew  
4 that the documents on the laptop were relevant to the  
5 case because he brought it up and said, well, I don't  
6 have any of that. I had them on this laptop and it  
7 died. Actually, he said during his first deposition  
8 that he still had the hard drive.

9 In terms of timing, discovery had been well  
10 underway when he threw it away, because we were in  
11 the middle of motion practice. It was actually  
12 shortly after the Court had asked us to go meet and  
13 confer again on our motion to compel documents that  
14 the laptop was thrown away. It was on the eve of  
15 defendant's deposition or his originally scheduled  
16 deposition, and so frankly, should have been right in  
17 his mind about what he was preparing to testify for  
18 pursuant to Rule 30(b)(6). So I don't think it's  
19 believable that he didn't know that those documents  
20 were relevant.

21 And frankly, it wasn't just training materials.  
22 The defendant testified during his deposition that  
23 the laptop had all of his licensing and settlement  
24 agreements there. So we -- and we submitted excerpts  
25 from that deposition to Your Honor. So they weren't

1 just training materials, and the defendant knew that  
2 the information was on there that we needed, and then  
3 threw it away anyway during the middle of motion  
4 practice when we were filing the motion to compel.  
5 So there is not any question on that.

6 In terms of, you know, just plaintiff, as a  
7 sanction, having to seek documents from defendant's  
8 attorneys and defendant's bank account, I just don't  
9 understand how that is a sanction against defendants.  
10 That's a cost plaintiffs are going to have to pay to  
11 do those things, and frankly, those documents are  
12 under the control of defendants.

13 THE COURT: Could the Court in that situation  
14 impose -- allow plaintiffs to do this third-party  
15 supplemental discovery, subpoenas and such, and then  
16 as part of the sanction, require the costs be paid by  
17 the defendant? I mean, why isn't that possible?

18 MS. BRUSS: Well, because defendant doesn't pay  
19 sanctions. We already have a sanctions order of  
20 thirty some thousand dollars they still haven't paid  
21 that this Court ordered last spring. So I don't --  
22 yeah, in theory, the defense, I suppose, could assume  
23 the costs of all this additional discovery, but they  
24 are not paying for them. And they refuse to do so  
25 and said that they won't.

1           So -- and also the other issue is, my client  
2           has a right to know the outcome of this case. At  
3           some point, he gets to be able to control his  
4           intellectual property. And while defendants are  
5           claiming this is ruining their business, it has made  
6           it impossible for our client to actually do anything  
7           with his IP. So putting it off for another year,  
8           it's not just a financial cost, and he's paying his  
9           attorney fees. We have to send out subpoenas,  
10          conduct depositions. That all costs money. I don't  
11          know -- I don't know that -- I suppose you could  
12          issue an order, but I don't believe it will be  
13          complied with, based on everything that has happened  
14          in this case.

15                THE COURT: All right.

16                MR. AUSTIN: Your Honor, just one  
17          clarification.

18                THE COURT: Yes, Mr. Austin.

19                MR. AUSTIN: The weekend -- just to give you  
20          the time here, in the deposition he testified that  
21          the laptop was thrown away the weekend of  
22          February 24th and 25th, which were the dates that the  
23          Court set for his deposition in Washington. And  
24          those dates we had to ask permission for because they  
25          were after the close of discovery.

1 THE COURT: Okay. Thank you, Mr. Austin.  
2 Appreciate that.

3 All right. Let's move on to our next topic for  
4 today, which is the request for sanctions regarding  
5 the May 30th and May 31st deposition. Who is going  
6 to argue that for the plaintiffs?

7 Is that you, Mr. Austin?

8 MR. AUSTIN: It is. Thank you, your Honor. So  
9 I think our briefing there too is pretty clear. This  
10 is kind of an unusual issue, I would imagine. I  
11 don't know that this comes up that often. But if you  
12 recall, Your Honor scheduled or compelled them to --  
13 you know, doctor -- or Mr. Trubow to go forward with  
14 depositions, and they had to be completed by the 31st  
15 of May. That was the Court's order.

16 We, in anticipation of trying to make sure we  
17 had a buffer time to get that all done, scheduled the  
18 depositions on the -- I believe they were the 24th  
19 and 25th of May, so there would be some time.

20 And then further, because we directed to have  
21 these depositions at Your Honor's order, the parties  
22 could not agree on a location. So they were held at  
23 my office. And to accommodate travel, we started  
24 those depositions on the first day a little later in  
25 the day to make sure that it would be available.

1           And I was hopeful we would be able to get them  
2       both done in those two days, but we did not. And so  
3       we had about a half day of additional deposition that  
4       needed to be taken after we completed what  
5       depositions we could do on the 24th and the 25th.  
6       And the parties amicably scheduled to have that final  
7       deposition taken I believe on the 30th of May. And I  
8       agreed to do that remotely by Zoom, because at this  
9       point, everybody had the documents. We could  
10      probably do it over Zoom and everybody could look at  
11      the binders that I had provided to everybody. So I  
12      felt that would be doable.

13           And then I'm going to go to the timeline. I  
14      think that's in our briefing. Because I think that's  
15      really what it comes down to -- actually, I'm not  
16      going to do that. I'm just going to cut to the chase  
17      on it, because the key point is we received notice --  
18      after we set this up, we sent them notice from the  
19      court reporter, which were the same court reporters  
20      that we utilized for the depositions at my office, so  
21      their contact information was already provided to  
22      defendant's counsel.

23           I forwarded to defendant's counsel the email I  
24      received confirming the start time of the deposition  
25      and the login that would be necessary to do it

1 through Zoom and that was done a day -- more than a  
2 day in advance. On that email, when I scheduled it,  
3 it identifies -- and we've had this discussion  
4 before -- that there is a hard cut off deadline to  
5 avoid nonrefundable fees for scheduling a remote  
6 deposition or any deposition for that matter, because  
7 at that point, the court reporter can no longer fill  
8 that blank, that gap, and we're going to be obligated  
9 to pay a minimum fee.

10 We received notice from plaintiff's counsel  
11 after that nonrefundable deadline had passed the eve  
12 before the original scheduled deposition that had  
13 been extended by the parties on May 30th. And so I,  
14 recognizing that it -- you know, they are not -- I'm  
15 not going to challenge somebody who says they are  
16 ill. That's -- I'm not going to get into that  
17 discussion.

18 So my response was, again, to defendant's  
19 counsel. I've got a court order that's only extended  
20 me until the 31st to get this done. I am happy to  
21 get on a phone and immediately see if we can't get  
22 this pushed out or whatever you would like to do.  
23 But because you're letting me know now when the  
24 courts are closed, it's in the evening on the 29th,  
25 and we are set to start the next morning, I will call

1       it off if you guys will, you know, if there is going  
2       to be no issue with you all paying the late  
3       cancellation or rescheduling fee.

4               And the response I -- and then you can go run  
5       to the Court, seek to do an emergency teleconference  
6       or whatever you need to do, and I will be available  
7       for that. And the response that I got from defense  
8       counsel, I think it was Ms. Ray, was sounds like a  
9       plan. Literally, quote/unquote, sounds like a plan.

10              So I went forward and rescheduled the  
11       deposition to the follow day, as I said I would do.  
12       I will schedule it to the 31st. That will give us a  
13       whole day to get in front of the Court to get this  
14       extended and, you know, then we can cancel it before  
15       the cut off, that deadline I think was 4:30 or four  
16       o'clock, something like that in the evening. And  
17       obviously, by that time, we would know or not know if  
18       the Court was going to grant the extension. I  
19       expected the Court would grant the extension. That  
20       was not my concern, but I don't have the unilateral  
21       power to do that.

22              And so I'm just telling her, here's what we  
23       need to do. I will do what I can to accommodate that  
24       time frame. I would rather it be rescheduled. I  
25       sent that information out first thing. We're talking



1 seven o'clock, eight o'clock in the morning on the  
2 30th and got no response for the rest of the entire  
3 day. In fact, never got a response until the  
4 following morning. And I repeatedly said, look,  
5 where are you at? I'm hanging by. You know, it's  
6 your burden to get ahold of the Court to seek the  
7 extension. No response at all.

8 And so the next -- I said I'm going to have to  
9 go forward the next morning and at least make a  
10 record. Here's the call in. You can call in and  
11 explain what happened on the record as well. She  
12 didn't respond. She didn't show up. Instead, the  
13 next morning, just as our court reporter -- as we're  
14 getting set up to do the Zoom conference and we are  
15 getting ready to go, I learn that they had filed a  
16 motion, a separate motion, not on an expedited basis  
17 to extend the discovery deadline based on the client  
18 being sick.

19 At which point my client has already incurred  
20 the fees for setting two depositions up. And that's  
21 what we are seeking to recover. It's kind of -- I  
22 guess, it's not a situation where I feel like there  
23 was necessarily bad faith. It was kind of neglect.  
24 You know, neglect is my concern here because at least  
25 one of those days the costs could have been readily

1       avoided. And I wouldn't have rescheduled if they  
2       were not going to go through this process. I would  
3       have just said we will make the record on the 30th  
4       and then we will go forward and you can see what you  
5       can get from the judge at that point. But I went  
6       through the process with the intent of helping give  
7       them the space to get the extension and I feel like  
8       it's like, you know -- it's like I'm getting -- my  
9       client is getting punished because I tried to be  
10      accommodating. That's really what I feel like is  
11      happening here on the cost.

12             And the other problem is this. I mean, I feel  
13      for somebody who is sick and then can't make it to  
14      something. But you know what? If that happens to me  
15      and I didn't get insurance when I bought my airplane  
16      ticket, I still have to pay the cancellation fee.  
17      They don't give me an out even though I have a  
18      legitimate excuse. And that's all we're asking for  
19      here. We're not asking for any of my time that was  
20      associated with setting those depositions up or  
21      changing the scheduling. We're just asking for the  
22      out-of-pocket costs my client had to incur to  
23      reschedule these and pay the nonrefundable late  
24      cancellation fees.

25             THE COURT: All right. Thank you, Mr. Austin.

1 Ms. Ray.

2 MS. RAY: Okay. Your Honor, I was trying to be  
3 accommodating too. We had conducted two gruelling  
4 days of deposition in Las Vegas, and we couldn't --  
5 Mr. Austin couldn't finish his questioning, so we  
6 scheduled a continuation by Zoom. And it was all  
7 working out, very cooperative. I was trying to  
8 cooperate and be accommodating too. But this was  
9 Memorial Day weekend. And on Monday when we were  
10 off, Mr. Trubow, the deponent, contacted me and said  
11 he had gotten COVID from his trip to Las Vegas and he  
12 just couldn't get out of bed.

13 And I contacted Mr. Austin immediately and told  
14 him we would have to postpone. Could we postpone for  
15 two weeks and I would try to contact the Court and  
16 get some kind of extension so that we could conduct  
17 the continuation of his deposition that he wanted  
18 to -- the questionings that he wanted to do of  
19 Mr. Trubow. And I did my best to try to contact the  
20 Court, calling the clerk, calling everybody I could  
21 to see if we could get an extension for Mr. Austin's  
22 continued deposition.

23 THE COURT: Ms. Ray -- hold on, Ms. Ray. But  
24 you didn't file any -- you didn't file an emergency  
25 motion of any sort at the time.

1 MS. RAY: I did file a motion. Yes, I filed a  
2 motion for continuation. I did. And nothing -- and  
3 I talked to Mr. Austin, and we -- it's not I wasn't  
4 accommodating or cooperating. We talked and he told  
5 me that I needed to file that motion, which I did.  
6 And he said you better do other things too, because  
7 the Court is not going to hear that right away. So I  
8 called the clerk of the court. I -- I just got no  
9 response at all from the Court and -- I actually  
10 emailed and contacted Mr. Austin numerous times. He  
11 called me and left messages. It wasn't like we  
12 weren't in contact. I got nothing accomplished on  
13 that -- the day the deposition was scheduled. And  
14 we -- we -- I can't believe he would say I wasn't  
15 cooperating. We were in, like, almost constant  
16 contact.

17 So then I said, please put your deposition off  
18 for a couple of weeks because Mr. Trubow, the  
19 deponent, he has COVID. And that COVID is not going  
20 to be resolved for a couple of weeks. And we agreed  
21 on that.

22 But nonetheless, Mr. Austin rescheduled the  
23 depositions. On the second day, I called at the time  
24 of the deposition, put on the record that I had tried  
25 to reschedule it somehow and I wasn't able to do

1       that. I did file a motion with the Court to postpone  
2       the depositions for a couple of weeks, but I didn't  
3       get any response. So I think it's really untrue that  
4       I was not in touch with him. It was untrue that I  
5       wasn't cooperating. I was totally accommodating, not  
6       to mention the fact that this was an entire  
7       accommodation to Mr. Austin to continue his two plus  
8       days of depositions, which we were completely willing  
9       to do but it just -- it couldn't be worked out. And  
10      I -- I think he felt compelled to schedule  
11      depositions, but they were like useless, because  
12      Mr. Trubow was flat in bed and couldn't -- couldn't  
13      testify.

14               So I don't know. I think it's a total  
15      mischaracterization that I wasn't accommodating or  
16      didn't cooperate. I filed a motion. I called the  
17      court. I was -- I was in constant, like, action  
18      trying to get this thing moved on, because we were  
19      trying to do it. So I think that's a  
20      mischaracterization.

21               THE COURT: Mr. Austin, at this point, have  
22      plaintiffs completed the deposition of Mr. Trubow?

23               MR. AUSTIN: Yes, Your Honor. You will recall  
24      that they did file their motion. And I apologize if  
25      Ms. Ray got the impression I was trying to say she

1 was not cooperative. She just wasn't responding in a  
2 manner that was timely enough to avoid us incurring  
3 late fees, the late cancellation fee. That was the  
4 point to what I was trying to make.

5 THE COURT: Okay.

6 MR. AUSTIN: So but there was -- obviously, I  
7 was trying to email her and contact her. She did not  
8 contact me back and say she was -- she had, you know,  
9 I didn't hear about the issues with the Court until  
10 the following day, by which time the deadline to  
11 avoid late cancellation fees had passed. And I'm  
12 talking the day of the 30th, for the next day, the  
13 31st, which was the day that we had scheduled the  
14 last deposition.

15 So the problem is -- and I don't know why she  
16 could not get ahold of the Court. That's -- seems to  
17 me that's not complicated. But in any event, that  
18 didn't happen on that end. As I said, I had no other  
19 choice. So it wasn't until the morning of the 31st  
20 that defendants filed their motion to continue the  
21 deposition, but that's already past the late  
22 cancellation deadline.

23 THE COURT: Okay.

24 MR. AUSTIN: And it's right when we're  
25 beginning to take the record. So and I may be

1 mistaken. I can go back and look whether or not she  
2 was there on the deposition. That's fine. That's  
3 not my point. My point is we incurred a cost here  
4 that we -- we didn't -- we wouldn't have incurred if  
5 she could have just made a call to the Court and  
6 asked to get this set up ahead of time or filed an  
7 emergency motion, let the Court know it's there, I  
8 think the Court would have responded very quickly,  
9 and that might well have happened.

10 Or at a minimum, she could have come back and  
11 said I couldn't get ahold of anybody. Let me know.  
12 I would still have had to go forward is the problem,  
13 because as you know, I can't unilaterally decide to  
14 just reschedule another deposition after discovery is  
15 closed, and I've only been given latitude to do it by  
16 the order of the Court to that day.

17 THE COURT: I understand.

18 MS. RAY: Your Honor, Your Honor, can I speak?

19 THE COURT: Yeah.

20 MS. RAY: Just in my personal defense, I called  
21 the clerk of the court, and they refused to set up  
22 any kind of conference. I couldn't do it. And I  
23 typed out a motion and filed it. I did all the  
24 things that Mr. Austin said I didn't do.

25 As a matter of fact, it's kind of personally

1 offensive, because I was really trying to get this  
2 thing postponed because my client was sick. He  
3 couldn't do it. I did all the things he said I  
4 didn't do and Mr. -- I have even a voicemail from  
5 Mr. Austin saying, please do this, please do that.  
6 And this was all on his behalf. I wasn't trying to  
7 continue a deposition for myself or for my client.  
8 It was all for Mr. Austin. And for him to accuse me  
9 of not doing these things, just personally I'm hurt.  
10 And I really wish that everybody could understand, I  
11 did every possible thing I could do to get this  
12 postponed. And I begged Mr. Austin to put it off for  
13 two weeks, which actually occurred. In the end, the  
14 deposition got taken. Case closed.

15 THE COURT: All right. Thank you, Counsel, for  
16 that argument. Let's move on to the next topic or  
17 category, which is the request for sanctions for  
18 defendant's failure to pay the previously ordered  
19 costs and fees on the motion to compel, which that's  
20 court order I think Docket 124 --

21 MR. AUSTIN: Yes.

22 THE COURT: -- is the order to compel. On the  
23 motion to compel. And then there is defendant's got  
24 a pending Rule 54 motion as well.

25 So, plaintiff, let's start with you. Who is



1 going to make those arguments?

2 MR. AUSTIN: I'm going to make this argument as  
3 well, your Honor.

4 THE COURT: Okay.

5 MR. AUSTIN: So I think if you look at our  
6 motion in that case, we laid out -- if I can pull it  
7 up here -- I think a pretty clear timeline of the  
8 events that took place. But in quick summary, the  
9 Court entered its order granting the motion for  
10 sanctions and fees. We then briefed the amounts.  
11 The Court then entered an order I think on June 15th,  
12 which is Docket 141. And it laid out that there were  
13 a total amount of fees of \$33,525.92 and directed  
14 defendants to pay that within 30 days of that  
15 June 15th order. That would then fall on July 15th  
16 for them to pay it.

17 They didn't pay it. Instead, on June 26th,  
18 they filed a notice of appeal to the Ninth Circuit  
19 for this order, which is not appealable, you know, at  
20 that point. It's not an interlocutory matter that  
21 can go before the Ninth Circuit.

22 On July 11th, about four days prior to the  
23 deadline to pay, the Ninth Circuit entered an order  
24 to show cause stating that this is not a -- that this  
25 order to pay sanctions under 37 -- so this is a 37(a)

1 sanctions grant -- is not appealable under 28 U.S.C.  
2 Section 1291. So -- and then ordered them to follow  
3 a -- yeah. Order to show cause why we shouldn't just  
4 terminate the appeal because this is not an order  
5 over which we have subject matter jurisdiction at the  
6 Ninth Circuit. That's the nature of that particular  
7 order. I believe we attached that to the motion --

8 THE COURT: You did.

9 MR. AUSTIN: -- as part of the process or we  
10 might have referred it to you, the Court. I can't  
11 remember if I did it by cite or if I did it by  
12 attaching the brief. It's been a bit of time.

13 But I do remember that the Court specifically  
14 cited to the Rosenfeld case, which is a Ninth Circuit  
15 binding precedent in which it specifically said that  
16 Rule 37(a) sanctions are generally not appealable.  
17 They are not final so they are not appealable.

18 So they were given 21 days to comply with that  
19 Ninth Circuit order. In the interim, they -- you  
20 know, they asked for an extension on August 7th to  
21 have additional time to file that. And then in that  
22 interim period, they came to the Court and filed the  
23 Rule 20 -- the Rule 54 motion seeking to have this  
24 clarified as a -- as a final judgment, right, under  
25 Rule 54.

1           So that's kind of the timing on when this took  
2 place, but the problem is they never actually filed  
3 their -- their extended briefing. They never  
4 responded to the Ninth Circuit's order to show cause.  
5 And so on September 8th of this year, the Ninth  
6 Circuit dismissed the appeal and issued an order  
7 stating that the mandate would issue and be -- and  
8 that this order would be the mandate within 21 days  
9 of that order, which was September 29th. So as of  
10 September 29, 2023, there is no appeal. It is -- the  
11 case is closed. The appeal is completely dismissed.

12           So then all that is -- so that gets you the  
13 kind of the background and the timing of it. And to  
14 date, after that happened, we then bring this motion  
15 because there has not been a payment and there has  
16 been, in fact, representation by Mr. Trubow himself  
17 that he will, quote, never pay it. And so we felt  
18 compelled to bring this to the Court's attention,  
19 because what's the point of having a sanctions motion  
20 or a sanctions order if the opposing party is going  
21 to never pay it. And so we felt like at this point  
22 there is no -- there is no sanction amount that you  
23 can issue that's going to actually result in a  
24 payment to plaintiff. We have been delayed by this  
25 point now, here we are in mid October, this whole

1 process started a year ago just about, within a month  
2 or so of a year ago.

3 THE COURT: Right.

4 MR. AUSTIN: As we were -- when we first sought  
5 to have these depositions taken. And we finally get  
6 them all done, but it takes a motion to compel and it  
7 takes an order of sanctions, and we still don't have  
8 resolution on all of these issues that were pending  
9 nearly a year ago that we have been seeking this  
10 entire time.

11 So we moved for, in this case as well,  
12 sanctions and case-ending sanctions. Again, as  
13 Ms. Bruss pointed out, we don't take that lightly.  
14 We understand, but we just feel like we are at our  
15 wits' end. I don't know what we can do. We have  
16 tolerated them going to an appeal on an appeal we  
17 think is frivolous, and we have tolerated the delays  
18 that have taken place.

19 But my client has been out of pocket much more  
20 than 33,000. You'll recall, Your Honor, that you  
21 discounted that fee. Unfortunately, it wasn't  
22 discounted to my client. So they paid the total sum,  
23 but -- and they paid a lot more as we have gone along  
24 trying to just get documents here. So they are out  
25 and have not been repaid, and now they are informed

1 by opposing counsel they are never going to -- or  
2 opposing party they are never going to get repaid.

3 So that gets us to the Rule 54 motion. And I  
4 think that motion is pretty clear. I don't know if  
5 there is anything that Your Honor would like to  
6 specifically talk about. But the case law in that  
7 motion is quite clear from the Ninth Circuit. Rule  
8 37(a) sanctions and sanctions for fees, as well as  
9 discovery orders, whatever category you want to put  
10 this in, none of them fit the criteria required in  
11 order to permit the Ninth Circuit to have subject  
12 matter jurisdiction over that as a final order. Even  
13 if the District Court errs and claims it is a final  
14 order, by their own case law, they will not accept  
15 jurisdiction over it, because their case law is quite  
16 clear it doesn't meet any of that criteria.

17 It's a little bit of a technical argument. And  
18 I laid that out as you go through for each of those  
19 categories, but this is pretty clearly a Rule 37(a)  
20 sanctions order that was issued by the Court. That's  
21 what the order stated for failure -- or as part of a  
22 motion to compel, and that is by precedent not  
23 appealable interlocutorily. It can be a part of a  
24 final judgment. It can be brought up in a final  
25 appeal, but it is not appealable at this point in

1 time and for a host of reasons. And the key ones are  
2 that it defeats the whole point of a sanctions motion  
3 to motivate opposing parties to comply with discovery  
4 if the -- if the opposing party can completely take  
5 all the teeth out of that order and deprive the  
6 sitting district court judge, and in this case  
7 magistrate judge, of the case and the ability to  
8 impose the order, and yet still force the opposing  
9 party, in this case plaintiffs and Dr. Trubow, to go  
10 forward and incur all the costs of proceeding to  
11 trial potentially with a host of sanctions orders  
12 that are never paid and waiting until they get to an  
13 appeal. At which point we never get anything we're  
14 looking for and the case and the ability of the Court  
15 to enforce its orders is neutered. And so the Ninth  
16 Circuit has made it quite clear in their Supreme  
17 Court case law as well. That's just not the rule and  
18 it's impermissible to issue a Rule 57 final judgment  
19 on a 37(a) sanction. Thank you, your Honor.

20 THE COURT: And, Mr. Austin, what is plaintiff  
21 asking the Court to do in terms of supplemental  
22 sanctions on that? Is it the case dispositive  
23 sanctions; is that what you're asking for?

24 MR. AUSTIN: It is. I don't know what else the  
25 Court can do. I mean, they have refused to pay

1 the -- pay the amount. There has been no -- there is  
2 an affirmative statement from the opposing party that  
3 he is not going to pay it. And so I don't know where  
4 else we go.

5 THE COURT: Well, couldn't the Court --

6 MR. AUSTIN: Yeah. Go ahead, Your Honor.

7 THE COURT: Couldn't the Court, Mr. Austin,  
8 just defer ruling or action regarding the failure to  
9 pay and have it be considered as a set off or part of  
10 the final judgment in this case after trial? Why  
11 couldn't the Court do that?

12 MR. AUSTIN: Because the point of Your Honor's  
13 order was not to issue a judgment. The point was to  
14 motivate the opposing party to comply with discovery.  
15 And they -- and we'll get into that in the next  
16 section. They have not done that. And there is  
17 now -- no sanction has effectively worked to do that.  
18 As a result, there is no power that the Court then  
19 has. There is no pressure that can be brought to  
20 bear on them.

21 Remember, we are the plaintiff in this action,  
22 so we are the one seeking the recovery or  
23 clarification that we own the intelligent property  
24 assets that we believe are contractually granted to  
25 us. And we also believe that we're entitled to

1 damages, although frankly, we're not confident that  
2 we will recover damages. So an offset of damages is  
3 rather immaterial in this case to us. The only  
4 sanction that is meaningful to us is clarity that  
5 Dr. Morisky has what he thought he had when he signed  
6 the settlement agreement, the CR2A.

7 THE COURT: Okay. All right. Thank you,  
8 Mr. Austin.

9 Ms. Ray, what would you like to tell me on  
10 this, your client's failure to pay? Has he stated  
11 that he will not pay or he cannot pay?

12 MS. RAY: At the moment, your Honor, he cannot  
13 pay. But let's step back. I'd like to deal with a  
14 couple of points, and one of -- I want to step back  
15 to the beginning about this sanctions motion. But  
16 also, I want to say that the matter is still pending  
17 at the Ninth Circuit. It's not over there. An  
18 appeal was filed. We're waiting on a ruling on the  
19 54(b), and it's still before the Ninth Circuit, the  
20 whole thing.

21 But let's step back to the beginning, how this  
22 sanctions motion came to be and what happened in  
23 terms of the sanctions being ordered. Mr. Harris was  
24 involved --

25 THE COURT: Ms. Ray, Ms. Ray, let me interrupt



1       you. The Court's already made its ruling, and the  
2       ruling concluded that Mr. Trubow was obligated to pay  
3       the -- you know, the 33,000 and plus by a particular  
4       date. So I don't want to really get into the facts  
5       or argument related that the Court considered before  
6       the Court made that ruling. Is that what you are  
7       intending to do here?

8               MS. RAY: No. No. But I just wanted to  
9       mention the circumstances and why all of this has  
10      come about. So I just wanted to say I don't want to  
11      get into the debate over your ruling or the Court's  
12      ruling, but I just wanted to say that Mr. Trubow was  
13      seeking some review of that. And that's why that  
14      appeal was filed, so that the situation could be  
15      reviewed, the order could be reviewed, and we were  
16      waiting to -- to hear from this Court in terms of the  
17      54(b) motion. And so that some review at the Ninth  
18      Circuit could be held over this -- the sanctions  
19      order. And it's still pending.

20             So we're really -- I'm not aware of Mr. Trubow  
21      saying he's never going to pay the sanctions. You  
22      know, that's -- possibly, but he says a lot of  
23      things, and I think he was just kind of upset over  
24      the amount. And so we're -- yeah.

25             MR. HARRIS: Your Honor, let me weigh in here

1 too. The fact of the matter is he cannot pay -- this  
2 is attorney Brent Harris representing MMAS  
3 Research --

4 THE COURT: Just a second. Mr. Harris, just a  
5 second. Let me go back to Ms. Ray.

6 Ms. Ray, you didn't -- defendants didn't file  
7 any objections to the order awarding fees and costs  
8 because you indicated you wanted that reviewed, but  
9 you didn't file any objections.

10 MS. RAY: Yes, we did.

11 THE COURT: To Judge Martinez?

12 MS. RAY: Yes. There was a -- excuse me for  
13 interrupting. Yes, we filed an objection, and we  
14 asked for it to be lowered and there was some  
15 response to that. So that was filed. And then after  
16 that, because we had no other option, we did file the  
17 appeal. And we've been filing papers with the Ninth  
18 Circuit to make sure that appeal gets heard. And if  
19 we don't get an order from this Court under 54(b),  
20 then -- then we won't be able to sustain that in the  
21 Ninth Circuit, but right now, it's still there.

22 THE COURT: Okay.

23 MS. RAY: And so whenever -- whenever  
24 plaintiffs file their motion for sanctions, we just  
25 said hopefully this Court can put a stay on this

1 whole thing until we hear from the Ninth Circuit.  
2 And to be honest, Your Honor, I think your proposal  
3 to postpone this until after the trial and the  
4 decision is issued in this case and to deal with the  
5 sanctions together with the whatever award or  
6 whatever the jury finds in the case, I think that  
7 resolves things. So I would be -- I would be in  
8 accord with your suggestion on that.

9 THE COURT: Well, yeah. Okay. Well, thank  
10 you. It was just trying to probe what other  
11 possibilities were. I'm not suggesting that as the  
12 direction the Court is taking.

13 Let me go to Mr. Harris. Mr. Harris, cocounsel  
14 with Ms. Ray, what did you want to tell the Court?

15 MR. HARRIS: Yes, your Honor. The fact of the  
16 matter is, doesn't matter what Mr. Trubow said. He  
17 cannot pay. That money does not exist. So, you  
18 know, the only option is to wait until there is a  
19 final judgment on the merits at this point. I don't,  
20 you know, see how an IP dispute can be resolved, you  
21 know, just because one party cannot afford to pay  
22 sanctions.

23 And, in fact, Your Honor, you've mentioned that  
24 the purpose -- or perhaps it was Mr. Austin, the  
25 purpose of the sanctions was to ensure that defendant

1        complied with discovery, and the fact of the matter  
2        is that he has complied since then. So although  
3        Mr. Austin is concerned that the Court is neutered in  
4        this case, I would say that the Court's decision was  
5        effective here.

6                THE COURT: All right. Thank you, Mr. Harris.  
7        All right. Let's move on to the request for  
8        production and the interrogatories. Let's take the  
9        request for productions first, which was the subject  
10       of the Court's order, Docket 124, where the Court  
11       ordered defendant to produce documents.

12               Mr. Austin, just generally, is it your position  
13       or the plaintiff that some documents have still not  
14       been produced?

15               MR. AUSTIN: Yes, your Honor. If you will  
16       recall the original motion to compel ordered the  
17       defendants to produce documents which respond to all  
18       22 requests for production. We received an updated  
19       and then a revised response to the request to produce  
20       on May 15, 2023, the very deadline. In fact, it was  
21       still roughly being put together. When that response  
22       was produced, very few documents were yet produced  
23       with it. We then received a very ad hoc rolling  
24       email of documents being sent to us over the course  
25       of the next 10 -- 13 days between May 16th and

1 May 28th, well after the deadline and too late to  
2 really be able to utilize a lot of these  
3 documentations in connection with the deposition.

4 But I will tell you that even in looking at  
5 just the response, the response only provides  
6 documents, and the only documents that were produced  
7 were identified as responsive to only Requests No. 3,  
8 No. 5, No. 6, No. 7, No. 9, No. 10, No. 11, No. 12,  
9 and No. 21. No other response -- no other request  
10 for production was identified in any response for a  
11 document. We had 22, so the balance -- to the  
12 balance, there was no response provided as with  
13 regarding the request for production.

14 Additionally, none of the documents we received  
15 were Bates numbered, and in some cases, we received  
16 over 300 documents at once purporting to be  
17 responsive to half a dozen questions without any  
18 delineation as to what they are responding to. And  
19 the requests are not necessarily of this -- you know,  
20 requests are not necessarily the same.

21 So we are trying to go through and email a set  
22 of documents that are very rough, not delineated  
23 clearly between when one document ends and another  
24 begins. No index identifying which document is  
25 which, what the title of the document is. There is

1 clear question about whether even these documents are  
2 complete, because they appear to have been cut from  
3 email correspondences in some cases.

4 And even so, as I can get into in the details,  
5 when you go in through each of those documents and  
6 compare them against the requests, they are not  
7 responsive. But I do want to make one note. In that  
8 May 15th response to requests for production, the  
9 request itself stops at 12. It produces a response  
10 up to 12, and then from 13 through 21, it's missing  
11 any response at all. There is no number 13, 14, 15,  
12 et cetera, and no response to those requests for  
13 production.

14 We then finally get a response to Request for  
15 Production 21. So all you're left with then is what  
16 was in the original response that Your Honor  
17 indicated was woefully inadequate and to which you  
18 compelled them to supplement with additional  
19 responses. They disregarded your order in its  
20 entirety as to those requests. And those requests  
21 were quite significant, just to let you know.

22 Request No. 12, these are all the documents  
23 dealing with their counterclaims and affirmative  
24 defenses. We are asking for the documents that  
25 support those claims. That's 13 and 14 are documents

1 regarding the fifth, sixth, and eighth affirmative  
2 defenses, 15 are documents regarding the seventh  
3 affirmative defenses, Request 16 are documents  
4 regarding the third counterclaim, Request 17 are  
5 documents regarding the fourth counterclaim, as well  
6 as 18, Document Request 19 are documents regarding  
7 the sixth and seventh counterclaims, and Document 20  
8 is with regard to all affirmative defenses and  
9 counterclaims that were not otherwise addressed. It  
10 was a catch-all request.

11 THE COURT: All right, Mr. Austin, let me make  
12 sure I understand. So you are saying Document  
13 Request 12 through 20, 12 through 20 --

14 MR. AUSTIN: Not 12. 13 through 20. 13  
15 through 20.

16 THE COURT: Okay. 13 through 20 defendant has  
17 not responded to after defendant received the Court's  
18 order on April 27, 2023. You've received no  
19 additional documents for those requests, Document  
20 Requests 13 through 20; is that correct?

21 MR. AUSTIN: That's correct, your Honor. There  
22 is no documents that are identified as responsive to  
23 any of those. And in the actual discovery document  
24 in which you identify what document you are  
25 providing, those numbers are not even included in the

1 response. They skip from 12 to 21, 22.

2 THE COURT: 12 to 21 or 12 to --

3 MR. AUSTIN: 12 to 21. Excuse me. They skip  
4 from 12. So they go 12 and then the next response is  
5 21.

6 THE COURT: Okay. All right. All right. So  
7 they -- the series is Document Request 13 to Document  
8 Request 20, those are the ones for which plaintiff is  
9 stating you've not received any supplemental  
10 documents; is that correct?

11 MR. AUSTIN: That is.

12 THE COURT: All right.

13 MR. AUSTIN: And then as I said, as a general  
14 rule, this was very difficult and cumbersome to go  
15 into. But as we got into them -- and I'll just kind  
16 of give you another general. This is also in our  
17 motion in a general fashion, but I can go through  
18 these granularly with you, you know, request by  
19 request.

20 They are just the documents they submitted to  
21 their amended complaint. They are their self-serving  
22 documents they had been trying to utilize in their  
23 own pleadings or in their motions, so they are  
24 cherry-picked. They are picking, you know, a license  
25 discussion and, you know, process for one license



1        agreement that they think gives them some grounds to  
2        move against Dr. Trubow, but they are ignoring the  
3        hundreds of license agreements that they acknowledge  
4        in the CR2A that MMAS has entered into with third  
5        parties. We have no documents with regard to those  
6        licenses. None. And yet they identify them as an  
7        exhibit to the CR2A. This is a list of all of our --  
8        of all the parties with whom we have license  
9        agreements.

10                So we have an idea of at least as of the time  
11        the CR2A was entered into, this was the -- this was  
12        what MMAS was doing. These are the license agreement  
13        that they had with people. What we don't know is  
14        what happened subsequent to that, because I don't  
15        know that we've got into much of the merits here, but  
16        CR2A provided them the opportunity to go out and  
17        secure settlements and file lawsuits with Dr. Morisky  
18        as a participant in the lawsuit, which would be  
19        required because he is the copyright holder, against  
20        infringers of the Morisky widget, which they claim to  
21        have copyright of. So it would have to be somebody  
22        who was already a licensee. That would be the only  
23        person who would likely have access to that widget.  
24        We clarify that in discovery. That widget is  
25        otherwise unavailable to anybody generally. They

1 would have to have received a copy of it pursuant to  
2 a prior license agreement of some sort so -- or prior  
3 negotiation.

4 So we already know there is a number of license  
5 agreements out there for which we received none of  
6 the actual agreements. These were all done by Trubow  
7 and his lawyers while the lawyers represented both  
8 parties, and at times might communicate with  
9 Dr. Morisky. It was expected and understood that  
10 this was, as part of the compromise, this was driven  
11 by Mr. Trubow and MMAS. So that's what I'm kind of  
12 telling you there. We know there is a lot that is  
13 missing because of that, and we know that these  
14 documents they produced, many of them are just  
15 nonresponsive.

16 And they are extraordinarily duplicative. I  
17 mean, we are talking about hundreds of pages that are  
18 copied two -- two to five times. I mean, you will  
19 find the CR2A, which is 140-something pages all  
20 together, multiple times is recopied and resubmitted.  
21 My emails and my discussions that were -- that  
22 were -- not my emails but there was a letter that was  
23 sent out on behalf of my client to licensees to say,  
24 hey, here is the status, that has been produced  
25 multiple times because that has become a tar baby

1 issue for the defendant in this case. So a lot of  
2 these things are our own, are our client's email  
3 correspondence back and forth but are not responsive  
4 to the key requests we are asking for. And so with  
5 the Court's indulgence, I'm happy to go through the  
6 specific requests.

7 THE COURT: You know, I think what I'd like to  
8 do is hear from Ms. Ray just generally, but I'm  
9 looking at the clock and we need to take our break  
10 for the earthquake drill that is going to happen here  
11 shortly.

12 So, Ms. Ray, when we get back I just -- I would  
13 like to hear from you as to, in particular, whether  
14 you and your client produced any documents responding  
15 to Document Requests 13 through 20, and then I'd like  
16 to get your general argument on this motion regarding  
17 your client's response to those requests for  
18 production.

19 And it looks like, Counsel, that we'll probably  
20 have to go through each one and each request for  
21 production and just go through it each one at a time.  
22 In fact, that's probably what I would plan to do  
23 after I hear from Ms. Ray about the gap on 13 to 20.

24 So, Counsel, let's -- court will be in recess.  
25 We will reconvene at 10:30. And we will see you back

1 here then.

2 Counsel, I don't know whether you want to try  
3 to meet and confer during that gap. You certainly  
4 can. I mean, I will be in the breakout room, but  
5 maybe if you don't think that is productive, then we  
6 will just reconvene at 10:30. All right.

7 Would you like an opportunity to discuss the  
8 issues, Mr. Austin, on this particular request for  
9 production or discovery, or would that not be  
10 fruitful?

11 MR. AUSTIN: I don't think it would be fruitful  
12 at this point, your Honor. It would take way more  
13 than ten minutes.

14 THE COURT: Okay.

15 MR. AUSTIN: To try and go through that  
16 process. And at this point, we've had a year of  
17 seeking these documents.

18 THE COURT: Okay. All right. With that -- all  
19 right. With that, the Court will be in recess and  
20 see you back here at 10:30. Thank you.

21 (A recess was taken.)

22 THE CLERK: Good morning. The U.S. District  
23 Court for the Western District of Washington is now  
24 again in session. The Honorable David W. Christel  
25 presiding.

1 THE COURT: Just waiting for everyone to get  
2 back to the Zoom.

3 MS. RAY: I'm back. I was disconnected, so I'm  
4 back.

5 THE COURT: Ms. Ray, I can't see your video.

6 MR. HARRIS: And for the record, your Honor, it  
7 looks like we've had a new party join us.

8 MS. RAY: That's me.

9 MR. HARRIS: No. It's some guy from the moving  
10 party, I think. Maybe they just changed their name.

11 MS. RAY: I think that's me.

12 MR. HARRIS: Looks like Dr. Morisky perhaps.

13 THE COURT: Mr. Austin, I don't have you on  
14 video. Ms. Bruss, could you maybe email him and --

15 MS. BRUSS: I was just on the phone with him  
16 about two minutes ago. So I think he -- he was  
17 logging on when I spoke to him, so he might be having  
18 a technical problem, but he was just in his office  
19 two minutes ago.

20 THE COURT: Okay. We will give him a few  
21 moments.

22 Ms. Ray, we are still waiting for your video?  
23 Okay. There you are.

24 MS. RAY: There I am. Okay.

25 THE COURT: We're waiting for Mr. Austin to

1       come back. And I'll be right back in a moment.

2               Mr. Austin, are you with us?

3               MR. AUSTIN: I am. Just -- just racing back,  
4       Your Honor.

5               THE COURT: Okay. Good. Thank you. Thank  
6       you. All right.

7               We're back on the record. Case No. 21-1301.  
8       Our court reporter is with us. Thank you,  
9       Ms. Turner. Or let me just confirm with Ms. Turner.  
10      Ms. Turner, are you with us and are you able to see  
11      and hear everybody?

12              THE COURT REPORTER: Yes, Your Honor. I am  
13      here and I am able to see and hear.

14              THE COURT: Okay. Great. Thank you,  
15      Ms. Turner.

16              We also have it's identified as a Donald M.  
17      Who -- is that a client?

18              MR. AUSTIN: Yes, your Honor. That would be my  
19      client. That's Dr. Donald Morisky.

20              THE COURT: All right. Thank you. Thank you.

21              All right. Let's go back to where we left.

22      And, Ms. Ray, first question for you is whether you  
23      and your client responded to the Document Requests 13  
24      to 20 after the Court entered the -- after the Court  
25      entered the order directing him to respond on or

1 before I think it was May 15th. Ms. Ray.

2 MS. RAY: (Audio disruption.)

3 I can't hear you, Ms. Ray.

4 MS. RAY: (Audio disruption.)

5 THE COURT: Ms. Ray, you are not coming  
6 through.

7 MS. RAY: (Audio disruption.) Can you hear me?

8 THE COURT: Nope.

9 MS. RAY: Can you hear me?

10 THE COURT: Nope.

11 MS. RAY: Okay. (Audio disruption.)

12 THE COURT: We can't hear you, Ms. Ray. Do you  
13 want to maybe log off and log back in and see if that  
14 works for you. Maybe turn off your video.

15 MS. RAY: (Audio disruption.)

16 THE COURT: Ms. Ray, maybe just turn off your  
17 video.

18 MS. RAY: (Audio disruption.)

19 THE COURT: Sometimes if you turn off your  
20 video, you can just participate audibly if you want  
21 to do that. Why don't you try that, Ms. Ray?

22 MS. RAY: Okay.

23 THE COURT: Ms. Ray, are you able to turn off  
24 your video? We are not hearing you at all.

25 MS. RAY: (Audio disruption.)

1 THE COURT: Looks like Ms. Ray disconnected.

2 Mr. Harris, are you -- I know you and Ms. Ray  
3 have split up the arguments today on the motions.  
4 Are you in a position to argue this motion on behalf  
5 of the defendants?

6 MR. HARRIS: I can, your Honor. I was not  
7 directly involved in the production of documents or  
8 any responses to discovery, so I -- I know our  
9 position on it, but I don't -- I can't speak directly  
10 to any specific questions.

11 THE COURT: All right. Well, let's -- we will  
12 just wait for Ms. Ray to see if she can reconnect.

13 MS. RAY: Hello. I might be back. Am I?

14 THE COURT: Okay. There you are.

15 MS. RAY: I went to my laptop and I got in  
16 better. So I apologize for that so I'd like to go  
17 forward.

18 THE COURT: All right. Please proceed,  
19 Ms. Ray.

20 MS. RAY: All right. On the -- you asked me  
21 about the document -- the responses to the document  
22 requests. So the situation is I'm not sure what  
23 happened to those responses, but what I did with the  
24 client, with Mr. Trubow is I --

25 THE COURT: Wait, wait, wait. Did you -- I'd



1 like to get your answer to the question. Did you and  
2 your client respond to Document Requests 13 to 20 by  
3 the May 15, 2023, deadline or not?

4 MS. RAY: Yes, I believe we did, Your Honor. I  
5 sat down with Mr. Trubow and went through every  
6 document request and we made a response. Now, what  
7 happened to the actual stated responses, I -- I'm  
8 not -- I'm not sure. But we did respond to all of  
9 the requests and uncovered every possible document  
10 that we could produce on those categories.

11 Some of the categories, your Honor, Mr. Trubow  
12 said that he doesn't have documents because they are  
13 with the joint counsel who represented both plaintiff  
14 and defendant. Many of the licensing documents from  
15 the past are in the hands of those joint  
16 representation lawyers which are each equally  
17 accessible by plaintiff. So, A, he doesn't have  
18 files on them. They are with the lawyers, and also,  
19 plaintiff can get them from those -- those parties.  
20 So there was nothing produced there.

21 There may be other categories that plaintiff is  
22 seeking that is -- there is nothing there. But I  
23 went through document by document request and  
24 produced everything that is available.

25 Now, as far as that 13 to 21, I don't know how

1       they got missed in terms of the response documents.  
2       If need be, we can go through those and identify  
3       whether or not they have been addressed. The second  
4       thing is, on that -- that's a topic of what documents  
5       have been produced.

6               So I wanted to be very thorough. There was a  
7       couple of sets of production, and some of it may have  
8       been duplicative. That is because we were trying to  
9       produce everything possible.

10              Now, first, I contacted Mr. Austin and asked  
11       him how he would like the production done. And he  
12       said, as long as they were done by categories and  
13       presented to him in terms of what areas the documents  
14       related to, that would be okay. I thought we did a  
15       pretty good job of that, although they weren't Bates  
16       numbered, that is true. They weren't Bates numbered,  
17       but they were presented by categories and there was  
18       nothing that was privileged to identify. So there  
19       was no privilege log presented. And everything that  
20       we have was produced. And one more thing. I --  
21       that's all. That's all for now.

22              THE COURT: That's all for now?

23              MS. RAY: Yeah. You may have more questions.

24              THE COURT: Okay. Well, I just want to go back  
25       and clarify. You said you didn't know what happened

1 to your responses to Requests for Production 13 to 20  
2 but --

3 MS. RAY: We did go -- within getting the  
4 production together, I did go through all of the  
5 document production requests and got documents from  
6 defendant on every category. So if need be, if we  
7 need to go through those requests again and make sure  
8 the documents are produced on those areas, that's  
9 acceptable to me. But I -- I don't have any -- any  
10 answer on whether -- on what happened to those actual  
11 responses. I don't know.

12 THE COURT: All right. Mr. Austin, how would  
13 you like to respond to that?

14 MR. AUSTIN: Well, I -- it's the first time  
15 I've heard that there was even a discussion with  
16 counsel. They had come up with documents responsive.  
17 The reality is we are now so far past the deadlines  
18 here. The intent of the Court's May 15th deadline  
19 was to afford plaintiff an opportunity, although very  
20 brief one, to review documents before going forward  
21 with depositions that were the next week. And we  
22 never got those documents, and we had to go forward  
23 with depositions without the benefit of them.

24 In any event we, even in the rolling production  
25 that was produced came too late, were too close to

1 the deposition for them to be of any use to us in  
2 those depositions.

3 Let me just address a few things that she  
4 raised. I think it's important to understand,  
5 pursuant to the parties' agreement, the joint counsel  
6 was joint counsel, but they were entirely controlled  
7 by, retained through the efforts of Mr. Trubow. We  
8 did not have their contact information, unless that  
9 was provided to us from Mr. Trubow or we received an  
10 email from one of the joint counsels.

11 In our request for interrogatories, we asked  
12 for all of the contact information for all of the  
13 joint counsel. We received no contact information  
14 for any of the joint counsel. So to say that we can  
15 subpoena them is impossible. We might be able to  
16 subpoena a few from our own research, but that was  
17 not -- they were not as easily accessible to us and  
18 just so you are aware, there were -- the vast  
19 majority of a lot of these license agreements  
20 occurred overseas in France, Chile, China, Korea,  
21 Japan. This is where the counsel were too. So these  
22 are not easily findable joint counsel to subpoena  
23 documents from. That's why we asked for their  
24 specific contact information. And we never got that  
25 information until post the depositions and we just

1 never got it. Just we got a list of a handful of  
2 names, and that's all we got. But no way to know how  
3 to get ahold of them. Not even -- not even an  
4 indication of which firms they were with, if they  
5 were with a firm.

6 So then with regard to the discussion about the  
7 rolling production, I told -- you know, Ms. Ray is  
8 correct. I informed her we would accommodate a  
9 rolling production, but she needed to, quote,  
10 identify the document that it was -- or document  
11 request that the document was responding to. I --  
12 you know, that's what my response was. I did not  
13 anticipate nor did I authorize her to send me batches  
14 of documents that were responsive to a half dozen  
15 requests. That is in -- that is not in compliance  
16 with the rules. That's not what is anticipated by  
17 the rules. That is not how you practice. And it's  
18 for good reasons. It's impossible for us to then go  
19 through that and figure out amongst a half dozen  
20 different responses to requests which document is  
21 responding to one or the other when in the response  
22 itself there is no identification of any document  
23 that is responsive to that request, zero, in every  
24 response.

25 THE COURT: Let me -- let me just interrupt you

1       there for a moment, Mr. Austin.

2               Ms. Ray, is that correct? Do you agree that  
3       the documents you provided were not designated by  
4       specific requests for production? Do you agree with  
5       that?

6               MS. RAY: Partially. There was -- I identified  
7       the document requests that they related to, but then  
8       there were groups of documents that had a general  
9       topic, and I identified that general topic for  
10      Mr. Austin. So there was some identification about  
11      the requests that they related to and some -- some  
12      identification as to the topic, because they would  
13      have been, like, a bunch of interrogatory -- document  
14      requests that they were responding to. So, for  
15      example, here are emails relating to the licensing  
16      program. That kind of thing. They are more  
17      topically identified.

18              THE COURT: All right. Back to you,  
19      Mr. Austin, if you want to continue.

20              MR. AUSTIN: Yeah, I will just respond to that  
21      one quick question, and then if you want to go  
22      through each request, we can do that.

23              THE COURT: Yeah, why don't you response to  
24      that topic. Let's go through the requests or I can  
25      try to narrow down each side's specific position on

1       this thing.

2               MR. AUSTIN: I think it would be beneficial, as  
3 I go through this, for the Court to understand what  
4 we received and what we saw. We would receive from  
5 Ms. Ray, and initially we were getting -- there were  
6 some emails were going to me and some were going to  
7 Ms. Bruss. We finally, just said, look. You've got  
8 to get them to both of us so we can see them. And  
9 she did.

10              But what we were seeing, and I've got all those  
11 emails stored as a separate caption, but the email  
12 would say something like this. It would be "first  
13 email regarding document production, five documents  
14 regarding Morisky widget agreement." So she would  
15 send me a document. I would go, okay. That one is  
16 going to be responsive to document five, widget  
17 agreements, but then when I would get into it,  
18 it's -- it's not -- it's not the list. Document  
19 Request No. 5 was a request for all of the  
20 agreements, and I would find one or two agreements  
21 and then a whole bunch of emails about that  
22 agreement. And I learned very quickly that these are  
23 not documents that were comprehensive of all the  
24 agreements. These were documents that they had  
25 addressed in their counterclaim and that they had not

1 produced prior to the deadline for their own  
2 production of documents. And so they were trying to  
3 get them in through our requests for production in  
4 support of their counterclaim or their affirmative  
5 defenses. And that's when it became very clear is  
6 what was happening there.

7 So then I would get a document that was an  
8 email back on the 16th of May, a day after the  
9 deadline, and I got quite a batch of them on that  
10 day. But I -- you know, with regard to -- let's see.  
11 Here's another one. Response to production -- so  
12 I've got a Daiichi attorney conference is the kind of  
13 title, email 5RSP11, 12 docs.

14 Daiichi is one of the licensees, so I'm getting  
15 kind of this vague reference to licensees, but then  
16 I've got about 80 to 100 documents that flow out of  
17 that that are supposedly applying to two different  
18 categories or two different requests with no  
19 delineation and no Bates numbering to identify them.  
20 And this is just only in the email that is coming to  
21 me. It's not identified in the actual response to  
22 the requests for production.

23 So if you go through each request for  
24 production, their answer in every single case  
25 predominantly is these documents have or will be



1 produced. And then there is no listing of the  
2 documents that have been produced or that will be  
3 produced. And there is no -- even when they sent us  
4 a revised response, which I think they sent on the  
5 24th or 25th of May, ten days late, we did not still  
6 get an identification of any of the documents that  
7 have been produced or allegedly produced in response  
8 to those requests. So there is no way for us to  
9 readily identify amongst the about 500 documents that  
10 got rolled out to us which response they were  
11 addressed to.

12 The work was put on us to go through those 500  
13 documents. And in some cases, I mean, literally I  
14 will point to Request 5, right. The Request 6,  
15 Request 7, Request 21, all the documents that they  
16 claim were responsive to those categories, some 400  
17 documents, were part of one email of documents that  
18 were attached that just said responsive to Requests  
19 5, 6, 7, and 21. That's improper. That's not  
20 responsive. And there is no listing of the documents  
21 by Bates number.

22 The rules are designed so that it is not the  
23 job of the party that is doing the requesting to try  
24 to divine what the producing party believes the  
25 document responds to in the question. That is their

1 job to specifically identify by request themselves  
2 which document is responsive to those, which would be  
3 very cumbersome for them to do because not one of  
4 those documents is Bates numbered. Many of them have  
5 no numbering. Many appear to have been cut and paste  
6 from emails into Word documents. Some were forwarded  
7 and continued to have forwarding information that  
8 may -- may be irrelevant, so they were in very bad  
9 shape as far as evidence is concerned. They were  
10 going to incur enormous challenges to put somebody on  
11 the stand and go through and delineate what this is  
12 and whether or not it has been tampered with, because  
13 there is clear evidence that it was cut and paste or  
14 pieces of it were cut and paste and put into a Word  
15 document.

16 And we also know, from having looked at these  
17 documents, that they literally -- that the work was  
18 done predominately, appears to us, by Mr. Trubow  
19 himself, and he prepared these and assembled them as  
20 a package and then forwarded them to his attorneys to  
21 be produced. We know that because the forwarding  
22 email was included in some cases.

23 So that's the nature that we're trying to deal  
24 with here.

25 THE COURT: Okay.

1 MR. AUSTIN: And it's impossible. It's  
2 impossible for us to clearly understand what is going  
3 on. And I can go through them in detail, but my  
4 point is I just want to make it clear that there was  
5 no grant of just a general category. What she did  
6 was not what I had requested. I requested identify  
7 the documents responsive to each request. The  
8 standard rule.

9 THE COURT: Right. All right. Thank you,  
10 Mr. Austin.

11 Ms. Ray, anything else you'd like to tell the  
12 Court on how you and your client responded to the  
13 requests for productions?

14 MS. RAY: Well, I would like to add that I did  
15 try to be as thorough as possible in getting  
16 documents on every category that was requested, and I  
17 sent them and identified the categories or the areas.  
18 And as far as what was produced, I believe everything  
19 was responded to and there is nothing more.

20 Organization-wise, I thought I was doing what  
21 Mr. Austin had said. And I hear now that he would  
22 like to have more specificity into what the -- what  
23 documents responded to what category.

24 THE COURT: All right.

25 MS. RAY: Yes. That's my comment.

1 THE COURT: Ms. Ray, do you believe that you  
2 and your client responded to the requests for  
3 productions in compliance with the rules of  
4 discovery, in particular by designating which  
5 documents connect with which requests for production?  
6 Do you think you've done that?

7 MS. RAY: I've done that for some of the  
8 documents. For others, I just added categories of  
9 document areas, because I wanted to make sure we had  
10 thoroughly covered those areas. For example,  
11 licensing-related documents. I didn't want to leave  
12 anything not produced. And some -- as Mr. Austin  
13 said, I would identify first the documents that  
14 responded to categories under the federal rules, but  
15 then I sent a lot more documents that were just  
16 topically related. Those things were not identified  
17 by document request. Those were just categories of  
18 documents to make sure that everything was -- they  
19 had everything.

20 I was really trying to get Mr. Austin documents  
21 to use for his deposition. And what he did in the  
22 deposition was he took the documents and then  
23 identified the categories and used them for  
24 questioning, and I thought we were good. So I'm kind  
25 of surprised to hear that it didn't work for him,

1 because it seemed to work for him for the deposition.

2 THE COURT: All right. Mr. Austin, I will give  
3 you a final response on this topic, then I want to  
4 move on to the interrogatory requests.

5 MR. AUSTIN: Sure. Let me just give you a  
6 sampling here of the documents that were absolutely  
7 not responsive to anything. An email that says  
8 "Exhibit 11 Barclays Cancer Institute." 80 pages.

9 THE COURT: What is your document -- what is  
10 your docket? Do you have a docket citation?

11 MR. AUSTIN: No. These were her production, so  
12 she would send me an email.

13 THE COURT: Oh, okay.

14 MR. AUSTIN: And attached to it would be a  
15 document entitled Exhibit 11 or Exhibit 12,  
16 Exhibit 16, Exhibit -- or 94 exhibits, second-amended  
17 counterclaim. I mean, they literally gave us the  
18 documents they had already produced in their  
19 counterclaim with the exhibit numbers still attached  
20 to the documents. These were not responsive to our  
21 questions. These were documents they wanted to have  
22 to utilize in their case because they didn't produce  
23 them before discovery closed. I mean, that's really  
24 what this was.

25 So that's my -- that's kind of the affront

1 here. So the majority of the documents come in this  
2 fashion. That's why I say they are not in a way  
3 where they are responsive to my requests, and the  
4 ones that purport to respond to our requests are  
5 simply the same thing but only cherry-picking the  
6 document they think would help bolster their case.  
7 This was clearly produced by -- you know, put  
8 together but Mr. Trubow with the mindset of how do I  
9 get the stuff in that I want to win my case on  
10 without really seeking anything that was responsive  
11 to ours.

12 And just to go into kind of a little bit of the  
13 detail on this, as we didn't go through granularly,  
14 but the financial documents are critical in our case.  
15 We asked for all of the financials. We got -- we got  
16 two tax returns and a single -- and one of the tax  
17 returns is not complete. It's a one-page cover. And  
18 only for the years '21 and '22, not for the range  
19 that we requested the documentation for. So we asked  
20 for documents and -- that were regarding financials  
21 and the response in both the interrogatories and in  
22 the requests for production was we don't have them.  
23 They are not in our possession, even though they  
24 identify their banking institutions.

25 But that goes back to the laptop, because this

1 is where I came back in the deposition and asked  
2 Mr. Trubow where -- you know, where are the documents  
3 that would have all of the financials or all of the  
4 license agreements? And his response was, well, I  
5 don't have them anymore. And ultimately we were able  
6 to draw out that what he meant by that was they were  
7 on the laptop.

8 And I said, well, can you produce the laptop?  
9 And initially, he said, well, the hard drive is  
10 broken. Well, can you produce it so we can check  
11 that? Well, you can't -- I don't have it.

12 I mean, it's -- I will tell you, the court  
13 reporter kind of chuckled in the course of his  
14 responses as the response became a little more of the  
15 dog ate my homework as we went along, until he  
16 finally said, well, no, it -- it broke and so I threw  
17 it away, right after he was supposed to have appeared  
18 and missed his deposition on that weekend. So this  
19 is where we're looking at this record.

20 So I go through, no financials we will produce.  
21 That's Request No. 9 and 10. We asked for all the  
22 litigation documents that were -- all the complaints,  
23 all the settlement agreements that were filed both  
24 with Dr. Morisky and we suspected and we found on our  
25 own complaints and settlement agreements that were

1 entered without Dr. Morisky, in express violation, we  
2 believe, of the requirements of the settlement  
3 agreement. Those document requests go from -- are 5,  
4 6, 7, and 8. In all cases, the response was, we  
5 don't have them. They are with our joint counsel,  
6 which were not identified and no contact information  
7 was provided.

8 That is core to our case. How do we show that  
9 they violated the CR2A by entering into settlement  
10 agreements, license agreements, and filing suits in  
11 which we were required to be paid a percentage of  
12 whatever return was obtained if we do not have any of  
13 the documents or the vast majority of them? All we  
14 have are the settlement agreements or the lawsuits  
15 that were problematic, and I there are about a  
16 handful of those, because those we became aware of  
17 and we raised objections to the terms because the  
18 terms incorrectly stated that Dr. Morisky didn't own  
19 his own IP. That was what it was. Those -- and  
20 those are the documents we got, which we already knew  
21 of because they were attached to their amended  
22 complaint under the same document. So that's -- I  
23 mean, this is the kind of thing we're looking at.

24 We finally did get the code, but let me tell  
25 you about that, because again, this is a copyright



1 case, and they were alleging we were infringing their  
2 code. So we asked for a production of the code. We  
3 initially got a document we could not open.  
4 Eventually, we were able to get a document we could  
5 open, but that did not happen until after the  
6 depositions had commenced in late May. And by which  
7 time that code, which is -- I don't know how many  
8 lines, but it's 500 pages if you print it out, or  
9 more, there is no way for me to have had somebody  
10 with proficiency in reading code to go through that  
11 and help me prepare for a deposition.

12 And then when we got to the deposition of the  
13 30(b)(6) witness, which was Mr. Trubow, in which one  
14 of the topics was speak to what parts of the code are  
15 your original material that has been inputted into --  
16 put in and that is the subject of the copyright as  
17 opposed to the material that is original to Dr.  
18 Morisky so that we can see what is derivative and  
19 transformative, because they were alleging in their  
20 complaint that the code was transformative. And  
21 Dr. Morisky -- or Mr. Trubow responded he could not  
22 speak to the code. He cannot read the code. He was  
23 utterly unprepared and incapable of providing any  
24 testimony as to that -- that request. So that's a  
25 whole other section we haven't gone into, but that's

1 part of our motion. We did not have a 30(b)(6)  
2 witness who could speak to all 14 topics. We had one  
3 who could speak to two or three of the 14. And we  
4 had provided the references in the deposition in  
5 which Mr. Trubow frankly acknowledges, I can't speak  
6 to that. I can't speak to that. I'm not prepared to  
7 talk to that on all of those.

8 So this is what we're dealing with now.  
9 Request No. 1, identify all of the documents  
10 responsive to the interrogatory by interrogatory  
11 number. I can tell you from looking at all of the  
12 emails that were sent to me, there were three emails  
13 that identified an interrogatory, and the responses  
14 were -- I got one that just said interrogatory  
15 responses with no delineation at all of what response  
16 it was responding to. I got another one that said  
17 response to Interrogatory 11, but then it -- it only  
18 included Daiichi and Racia [phonetic], 2 of 100 plus  
19 licensees that were the subject of legal actions.  
20 That's what request 11 was to provide us documents  
21 with response to.

22 And I got one -- I got another one for Rog 11  
23 and I got a final email for rog -- for Interrogatory  
24 Responses 5, 6, and 9. So of the total of  
25 interrogatory requests that we made, and there were

1       23, I think we got specifically identified four.  
2       One, two, three, four.

3               THE COURT: And when you say specifically  
4       identified, that means that the information --

5               MR. AUSTIN: At least were in the title of the  
6       email that was sent to me, but no document was  
7       identified. It was just these documents are  
8       generally responsive to Interrogatories 5, 6, and 9.

9               THE COURT: Okay.

10              MR. AUSTIN: Because the documents that are --  
11       you know, it's the response to what was requested in  
12       No. 1, these are the documents that are responsive to  
13       Interrogatories 5, 6, and 9. But when I get into  
14       them, I realize they are utterly inadequate. They  
15       are not responsive and not complete. And I have not  
16       gone through every single one of these, but we have  
17       gone -- I have through this. It is painful and it is  
18       extraordinarily time consuming.

19              But the bottom line is at day's end, we don't  
20       have a production that meets the rules that is  
21       usable. I literally had to go myself and have my  
22       team in the few hours that we had available the day  
23       before the deposition and the day of the deposition  
24       take some of their documents and Bates number them so  
25       that I could create a comprehensible record on the

1 deposition. But by no means did I -- you know, is  
2 that comprehensive. That's just what we could  
3 quickly grab in the rush we could do when these  
4 documents came in literally, you know, right before  
5 we're going forward on the deposition.

6 So this is the frustration. We're -- we've  
7 been a year into this, and we still don't have the  
8 critical documents that are at the core of our case.  
9 What are the license agreements? What are the  
10 settlement agreements? How much money was there?  
11 Was Dr. Morisky a part of each of these agreements?  
12 We have nothing comprehensive, no list, nothing of  
13 that nature. And we know it's much more than four or  
14 five or six or seven of these arguments, because it's  
15 listed as hundreds in the actual agreement that they  
16 have licenses with. So we don't have any financials  
17 as a result of that either. We don't have any  
18 records.

19 Their response is we can't get them. And yet  
20 they can identify their own bank, but they are asking  
21 us to go subpoena their bank after discovery is  
22 closed when they finally are compelled to produce a  
23 response to identify their bank. Then they say, oh,  
24 here's our bank, but we don't have the records  
25 because we didn't go get them and now you can't

1 because discovery is closed. Thanks, your Honor.

2 THE COURT: Thank you, Mr. Austin.

3 Ms. Ray, what else would you like to tell the  
4 Court regarding these requests for productions and  
5 your client's response to discovery?

6 MS. RAY: Your Honor, thank you. Yes, we  
7 produced everything that we possibly could and  
8 identified what I could according to interrogatories.  
9 I thought we did a responsible job and identified the  
10 responses to interrogatories. But then, as I said, I  
11 provided more. And therein lies, I guess, the  
12 problem. I sent a lot of extra documents and  
13 they're -- they're -- they are in topics rather than  
14 identifying interrogatories. That's -- I just threw  
15 these other documents in in case Mr. Austin wanted to  
16 use them in his deposition. So there I guess is the  
17 problem.

18 I identified responsive documents by  
19 interrogatory to the extent possible. One of the  
20 problems here is that many of the documents that they  
21 are seeking for their case don't exist. There is  
22 very little on licensing and financial records, and a  
23 lot of it is equally available to them by subpoena  
24 through the third-party lawyers. And so we're stuck  
25 with in between. We don't have any documents to

1 produce.

2 And they have questions about things that just  
3 is part of their, quote, case, but they don't exist.  
4 So there we are. I -- we're in a position where we  
5 can't produce anything related to a question they may  
6 have and that doesn't mean we're not responsive.  
7 It's just we don't have anything. So thank you, your  
8 Honor.

9 THE COURT: All right.

10 MS. BRUSS: Your Honor, may I cite to one part  
11 of the record on this issue? We submitted to the  
12 Court where Mr. Trubow testified in his deposition  
13 that one of his attorneys had given him a Dropbox  
14 full of documents that was so large he didn't  
15 download it. He said, "When I asked him for the  
16 stuff post CR2A, he gave me a Dropbox. It had so  
17 much stuff in it I just didn't have time to go  
18 through it."

19 And then Mr. Austin says, "Have you produced  
20 any of that information from the Dropbox in this  
21 litigation?"

22 Answer: "The Dropbox is expired. I didn't  
23 even download it. It was so big."

24 This is at Document 155-8 and that is  
25 Mr. Trubow's testimony. So he did have documents.

1 He just didn't want to look at them and didn't bother  
2 to turn them over and didn't tell us about them until  
3 his deposition. He also testified that he eventually  
4 got bank statements from some of his banks that he  
5 gave to his bookkeeper but never produced to us.

6 So this argument that they produced everything  
7 they have is contradicted by Mr. Trubow's own  
8 testimony under oath.

9 THE COURT: All right. Thank you, Counsel.  
10 Let's move on to the final topic for today in this  
11 hearing, which is we got a motion to stay and an  
12 argument regarding the current scheduling order and  
13 trial date.

14 On the plaintiff's side, Mr. Austin, can this  
15 case proceed to trial on November 27th before Judge  
16 Martinez?

17 You are on mute.

18 MS. BRUSS: You are on mute, Chris.

19 MR. AUSTIN: I'm going to pass the baton to my  
20 colleague on this one, because she is the one that  
21 was prepared to address this issue.

22 THE COURT: Okay. Go ahead, Ms. Bruss.

23 MS. BRUSS: Thank you. I feel like it's fairly  
24 clear from everything we've discussed today, no,  
25 because we don't have -- I mean, we've got a motion

1 in limine deadline of October 26th. We don't have  
2 documents, we don't have -- I mean, no, we don't. If  
3 the next step is going to be requiring us to  
4 undertake the expense of sending subpoenas to  
5 defendant's agents to obtain documents that he should  
6 have produced, I don't know how long that's going to  
7 take. But no, we are not prepared to move forward  
8 because we don't have the core evidence that we  
9 should have. We should have had a year ago. So no.

10 THE COURT: How about on behalf of the  
11 defendants, Ms. Ray?

12 MS. RAY: Actually, we've been preparing the  
13 same time period and we're ready to go. We're ready  
14 for November 27th.

15 THE COURT: Okay. All right. Now, possibly,  
16 if you had a motion to stay, what else would you like  
17 to tell the Court on that motion to stay, Ms. Bruss?  
18 Are you -- you are asking for case dispositive  
19 sanctions. If the Court doesn't do that, then I'm  
20 interpreting your argument as being that you want to  
21 stay the case or continue the trial date; is that  
22 what you're looking for?

23 MS. BRUSS: Your Honor, at this point what we  
24 would be seeking in the event the Court decided that  
25 this case can somehow go forward, we are asking for



1 an extension of all of the deadlines by a substantial  
2 amount of time so that we can reopen discovery. We  
3 don't believe that defendants should be able to  
4 reopen discovery. They've had ample opportunity.  
5 But we will need to reopen to send out subpoenas,  
6 apparently.

7 We would ask that the Court require defense to  
8 pay for those, although I don't see that actually  
9 being effective. But if we're going to move forward,  
10 we need additional time, so we would want to -- we  
11 would ask the Court to extend the deadlines at least  
12 six months for completion of discovery, further  
13 depositions. I believe we're going to need to depose  
14 probably Mr. Mackey. He seems to be the only one  
15 that knows about source code on defense side. So  
16 conducting additional deposition, sending out  
17 subpoenas, any further discovery that's resulting  
18 from those and then motion practice after that.

19 In theory, a lot of this case could have been  
20 dealt with on dispositive motions, but we couldn't  
21 file a dispositive motion without documents and  
22 without discovery. So we would like an extension of  
23 the dispositive motion deadline after the new  
24 discovery deadline so that we can try to resolve this  
25 case without spending a lot of the jury's time that

1 doesn't need to be spent.

2 THE COURT: Understand that.

3 MR. AUSTIN: Your Honor, just if I may, the  
4 request for a stay was to stay the proceedings of the  
5 case until the Court ruled on these motions that are  
6 before you today.

7 THE COURT: Yeah. Okay. Okay. All right,  
8 Counsel. I think we've been through the topics for  
9 today. Is there anything on behalf of the plaintiff  
10 you think you would like to address for the Court,  
11 Mr. Austin, Ms. Bruss?

12 MR. AUSTIN: I think we have covered much more  
13 than I thought we might be doing today, so I don't  
14 think there is anything more from us at this point to  
15 bring to the Court's attention.

16 THE COURT: All right. How about you, Ms. Ray  
17 or Mr. Harris, on behalf of the defendants?

18 MS. RAY: I will go first. Thank you, your  
19 Honor. Thank you for the Court spending the time on  
20 these motions and making the Court's effort to  
21 resolve the issues that we were kind of wondering and  
22 wondering what the resolution would be and we  
23 appreciate what you've done today. Thank you very  
24 much.

25 THE COURT: All right. Mr. Harris, anything?

1 MR. HARRIS: Yes, Your Honor. Just final word  
2 for me, defense does request that if you do extend  
3 the deadlines for plaintiffs that you also extend the  
4 deadlines for defendants, as there was some other  
5 discovery disputes that, you know, we would like to  
6 engage in as well or at least hopefully not disputes  
7 but some discovery that we were not able to complete.  
8 And that's all. Thank you for your time this  
9 morning.

10 MS. BRUSS: Your Honor, may I make one point.  
11 To the extent the defendant's are asking for an  
12 extension of discovery on their end, we would like  
13 the opportunity to brief a response.

14 THE COURT: Right. The Court doesn't have a  
15 request from the defendants that's been filed to  
16 reopen discovery, so that's not even before the Court  
17 at this time.

18 MR. HARRIS: Yes, your Honor. Ms. Bruss just  
19 said that she requested that the Court extend  
20 discovery for plaintiffs exclusively, so I was merely  
21 responding to that statement.

22 THE COURT: Yeah, and the plaintiffs have  
23 actually filed a motion to that effect. I think  
24 that's included in what they submitted as an  
25 alternative request, that they be given an

1 opportunity to conduct -- to reopen discovery, so  
2 that actually is before the Court.

3 MR. HARRIS: Understood, your Honor.

4 MS. RAY: Your Honor, we would like the  
5 opportunity to file a motion to extend discovery as  
6 well if -- if there is an extension of time for  
7 discovery for the plaintiffs, we would like the  
8 opportunity to move equally for time.

9 THE COURT: Court's not going to make a ruling  
10 on that, Ms. Ray, at this point. You know, you are  
11 always free to file whatever motions you think are  
12 appropriate. The Court would consider any motions at  
13 the time that you get them filed and they are ready  
14 for the Court's consideration.

15 MS. RAY: Thank you, your Honor.

16 THE COURT: With that, Counsel, thank you for  
17 your arguments this afternoon. The Court is in  
18 recess. Thank you.

19 (Court adjourned.)  
20  
21  
22  
23  
24  
25

C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF LEWIS )

I, JESSICA L. TURNER, Certified Court Reporter  
for the State of Washington, do hereby certify:

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and reduced to typewriting by means of computer-aided  
transcription;

That said transcript is a full, true, and  
correct transcript of my shorthand notes of the  
proceedings heard via Zoom videoconference before  
Hon. David W. Christel on October 19, 2023, for the  
U.S. District Court, Western District of Washington;

That I am not a relative or employee of counsel  
or to either of the parties herein or otherwise  
interested in said proceedings.

Signed this 22nd day of May, 2024.



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Jessica L. Turner  
CCR No. 3187